

**BEFORE THE COMMISSIONER OF THE
TENNESSEE DEPARTMENT OF COMMERCE AND INSURANCE**

IN THE MATTER OF:

TENNESSEE SECURITIES DIVISION
Petitioner

v.

**MERIT QUEST CAPITAL
MANAGEMENT INTERNATIONAL, LTD
IMPACT, IMPACT INTERNATIONAL
GRAND ENTERPRISES INC.
FRANK A. HARRIS,
KRISTINA M METCALFE,
DON FORTUNE
And GLENDA FORTUNE**

DOCKET NO. 12.06-007800J

ORDER

THIS ORDER IS AN INITIAL ORDER RENDERED BY AN ADMINISTRATIVE JUDGE WITH THE ADMINISTRATIVE PROCEDURES DIVISION.

THE INITIAL ORDER IS NOT A FINAL ORDER BUT SHALL BECOME A FINAL ORDER UNLESS

1. PARTY FILES A WRITTEN APPEAL OR PETITION FOR RECONSIDERATION WITH THE ADMINISTRATIVE PROCEDURES DIVISION NO LATER THAN February 20, 2001.
OR

2. THE AGENCY FILES A WRITTEN NOTICE OF REVIEW WITH THE ADMINISTRATIVE PROCEDURES DIVISION NO LATER THAN February 20, 2001.

YOU MUST FILE THE APPEAL, PETITION FOR RECONSIDERATION OR NOTICE OF REVIEW WITH THE ADMINISTRATIVE PROCEDURES DIVISION. THE ADDRESS OF THE ADMINISTRATIVE PROCEDURES DIVISION IS:

SECRETARY OF STATE
ADMINISTRATIVE PROCEDURES DIVISION
312 EIGHTH AVENUE NORTH
8TH FLOOR, WILLIAM R. SNODGRASS TOWER
NASHVILLE, TN 37243

IF YOU HAVE ANY FURTHER QUESTIONS, PLEASE CALL THE ADMINISTRATIVE PROCEDURES DIVISION, 615/741-7008 OR 741-2078 OR FAX 741-4472. PLEASE CONSULT APPENDIX A AFFIXED TO THE INITIAL ORDER FOR NOTICE OF APPEAL PROCEDURES.

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TENNESSEE DEPARTMENT OF COMMERCE AND INSURANCE**

IN THE MATTER OF:

TENNESSEE SECURITIES DIVISION

v.

**MERIT QUEST CAPITAL,
MANGEMENT INTERNATIONAL, LTD.,
IMPACT, IMPACT INTERNATIONAL,
GRAND ENTERPRISES, INC.,
FRANK A. HARRIS,
KRISTINA M. METCALFE,
DON FORTUNE,
and GLENDA FORTUNE**

Docket No. 12.06-007800J

ORDER

This matter came to be heard on November 21, 2000, before Thomas G. Stovall, Administrative Judge, assigned by the Secretary of State, and sitting for Commissioner of the Tennessee Department of Commerce and Insurance in Nashville, Tennessee. Mr. John F. Morris, Staff Attorney for the Department and Commerce and Insurance, Securities Division, represented the State. The Respondent, Frank Harris, was present and represented by counsel, Mr. James A. Freeman and Mr. John R. Callcott. This matter became ready for consideration on January 9, 2001.

The subject of this hearing was the Petition and Order to Cease and Desist filed by the Securities Division ("Division") against the Respondents for alleged violations of the Tennessee Securities Act ("Act"). The matters regarding all named Respondents except Frank Harris and Impact have been resolved to the satisfaction of all parties. Division's request for a Cease and Desist Order against the Respondents Frank Harris and

Impact remained as the sole subject of this proceeding. (Impact is a sole proprietorship of Frank Harris. For purposes of this Order, the "Respondent" will refer to both Frank Harris and Impact.) After consideration of the record in this matter, it is determined that the Respondent violated provisions of the Act, and he is hereby ORDERED to CEASE and DESIST from any further activity in violation of the Act. This decision is based upon the following findings of fact and conclusions of law.

FINDINGS OF FACT

To conduct securities transactions in Tennessee, an individual must be employed by a registered broker-dealer and be personally registered with the Division as an agent. The Respondent Frank Harris, who is a resident of Old Hickory, Tennessee, has never registered with the Division as a broker-dealer or as an agent of a broker-dealer.

2. The Respondent was involved in an investment program wherein he solicited investors for Merit Quest Management International, Ltd. ("Merit Quest"). Merit Quest was operated by Ron Hogsed, who resided in Erwin, **Tennessee**. **The** investors were to invest a minimum of \$10,000.00 in a "High Yield Investment Program." After filling out the necessary paperwork, the investors were to forward their money to the Hercules Holding trust account, an account operated by Hogsed, for use by Merit Quest. A mirror image of the trust was used in order to effectuate trades in prime bank debentures by overseas "traders" on behalf of investors in the trust. **As the money in the** trust account was never to be actually transferred out of Hercules Holding, but was to remain in the account to be "reflected" against, the investor was guaranteed the return of

their principle. The principle could not be “lost” because it always remained with Hercules Holding. The investor was to receive a 25% return on their investment on a monthly basis. The Respondent was to make a 25% return or commission on each of the accounts he brought into the Merit Quest program. The investors were advised that they were prohibited from making any unauthorized contact with any of the banks involved in the trading program. The penalty for making any such contact was the loss of any money **they had earned in the program.**

3. The description of the Merit Quest Program contained in Finding of Fact **No. 2 is admittedly vague.** The description of the program offered by the Respondent in his deposition, testimony at the hearing, and supporting documents, was nonsensical and **impossible to follow.**

4. Glen and Joanne Hardcastle were acquaintances of the Respondent and his family. In 1997, the Respondent first approached the Hardcastles about investing in the Merit Quest Program. Initially, they declined to participate. **In 1999, the Respondent's** sister, who was working with the Respondent, brought some papers and a brochure about Merit Quest to the Hardcastles' home. The Hardcastles then met with the Respondent and his father, and became convinced that the Merit Quest program was a good **investment opportunity.** In September and October 1999, Glen Hardcastle withdrew a total of \$55,000.00 from his mutual funds in two withdrawals, the first for \$30,000.00 and **the second for \$25,000.00.** He invested the entire amount in the program. **The** Hardcastles were told that they could withdraw any interest that accrued in their account

at any time, but they had to leave their initial investment in the program for at least one year. Glen Hardcastle received one monthly statement indicating that his account had accrued \$7,500.00 in interest in the first month on his initial \$30,000.00 investment. He received no more statements and has received no money, including his investment of \$55,000.00

5. Joanne Hardcastle referred another individual to the Respondent for participation in the program. For this referral, she was to receive \$1,000.00. She was paid \$500.00 by the Respondent's sister.

6. Dale Pyron invested \$25,000.00 in the Merit Quest program. He never talked to the Respondent until he met with him to fill out the paperwork to begin participation in the investment program. Pyron received one statement which indicated that his account had accrued \$6,000.00 in interest the first month. He received no further statements. Although Pyron did not receive any of the interest which supposedly accrued in his account, the Respondent did return his investment of \$25,000.00.

7. The Respondent brought numerous other investors into the Merit Quest Program. The Respondent testified that he personally lost in excess of \$200,000.00 in the Merit Quest investment program.

8. Robert Heisse, a Securities Examiner with the Division, testified that he is familiar with similar investment schemes that have been halted by the Commissioner as being conducted in violation of the Act

CONCLUSIONS OF LAW

T.C.A. §48-2-109(a) provides: “[I]t is unlawful for any person to transact business from or in this state as a broker-dealer or agent unless such person is registered as a broker-dealer or agent under this part.”

2 T.C.A. §48-2-104 makes it unlawful for any person to sell any security unless: (1) It is registered under this part; (2) The security or transaction is exempted under §48-2-103; or (3) The security is a covered security.

3 T.C.A. §48-2-102(12) expressly includes “investment contracts” in the definition of “security.”

4. The State has carried its burden of proof by a preponderance of the evidence that the Respondent, who was not registered with the Securities Division as a broker-dealer or an agent, was involved in the unlawful sale of unregistered securities by his involvement in the Merit Quest investment program.

5. In Security and Exchange Commission v. Lauer, 52 F. 3d 667, 670 (7th Cir. 1995), the court ruled

[Investment contract] is a term of art in the securities laws. It means an interest that is not a conventional security like a bond or a share of common stock but that, having the essential properties of a conventional security--being an undivided, passive (that is, not managed by the investor) financial interest in a pool of assets--is treated as one for purposes of these laws.

6. In determining whether an instrument is an “investment contract”, and thus a “security” pursuant to §48-2-102(12), a test was set forth by the Tennessee Court of Criminal Appeals in Brewer v. State, 932 S.W.2d (Tenn. Cr. App. 1996). Pursuant to Brewer, an investment contract exists when:

(1) An offeree furnishes initial value to an offeror, and (2) a portion of this initial value is subjected to the risks of the enterprise, and (3) the furnishing of the initial value is induced by the offeror's promises or representations which give rise to a reasonable understanding that a valuable benefit of some kind, over and above the initial value, will accrue to the offeree as a result of the operation of the enterprise, and (4) the offeree does not receive the right to exercise practical and actual control over the managerial decisions of the enterprise.

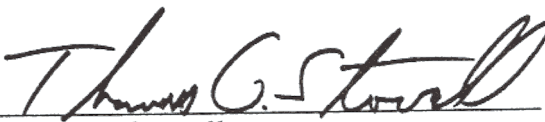
7. The Tennessee Supreme Court in DeWees v. State, 390 S.W.2d 241 (Tenn. 1965), emphasized the "remedial purpose" of the Tennessee Securities Act to protect the public from "frauds and impositions."

8. The Merit Quest program meets the definition of an investment contract as defined by Brewer, and is thus subject to regulation under the Act. **The investors** furnished initial value (their investments) to the offeror, the Respondent on behalf of **Merit Quest**. The investments were subject to the risk of the enterprise, most specifically because the investors had no ability to know whether their money was actually to be used in the manner in which it was represented to them by the Respondent. **Indeed, it must be** assumed that the money was not used as intended as the Respondent has been unable to produce any evidence to support the argument that this program was anything other than a **fraudulent scheme**. The investments were induced by representations made by the Respondent that the investors could expect a 25% monthly return on their investment. Finally, the investors exercised no control over the managerial decisions of the enterprise. Not only did the investors have no control over the decisions being made by Merit Quest,

but they were advised that they would lose all money earned through the program if they made any unauthorized contact with any of the participating banks.

9. The Respondent, who is not registered with the Division as a broker-dealer or agent, was clearly involved in the sale of unregistered securities in violation of the Tennessee Securities Act. Therefore, it is hereby ORDERED that the Cease and Desist Order entered by the Commissioner which ordered the Respondent to cease and desist all further violations of the Act is UPHELD.

This Initial Order entered and effective this 2nd day of February, 2001


Thomas G. Stovall
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State,
this 2nd day of February, 2001.


Charles C. Sullivan, II, Director
Administrative Procedures Division 

APPENDIX A TO INITIAL ORDER

NOTICE OF APPEAL PROCEDURES

Review of Initial Order

This Initial Order shall become a Final Order (reviewable as set forth below) fifteen (15) days after the entry date of this Initial Order, unless either or both of the following actions are taken:

(1) Either party files a petition for appeal to the agency or the agency on its own motion gives written notice of its intention to review the Initial Order, within fifteen (15) days after the entry date of the Initial Order or as otherwise provided below. If either of these actions occur, there is no Final Order until review by the agency and entry of a new Final Order or adoption and entry of the Initial Order, in whole or in part, as the Final Order. A petition for appeal to the agency must be filed within the proper time period with the Administrative Procedures Division of the Office of the Secretary of State, 17th Floor, James K. Polk Building, Nashville, Tennessee, 37243-0307. (Telephone No. (615) 741-7008). See Tennessee Code Annotated, Section (T.C.A. §) 4-5-315, on review of initial orders by the agency.

(2) A party files a petition for reconsideration of this Initial Order, within fifteen (15) days after the entry date of the Initial Order. This petition must be filed with the Administrative Procedures Division at the above address. A petition for reconsideration is deemed denied if no action is taken within twenty (20) days of filing. A new fifteen (15) day period for the filing of an appeal to the agency (as set forth in paragraph (1) above) starts to run from the entry date of an order disposing of a petition for reconsideration, or from the twentieth day after filing of the petition, if no order is issued. See T.C.A. §4-5-317 on petitions for reconsideration.

A party may petition the agency for a stay of the Initial Order within seven (7) days after the entry date of the order. See T.C.A. §4-5-316.

Review of Final Order

Within ten (10) days after the Initial Order becomes a Final Order, or within ten (10) days after the entry date of a Final Order by the agency, a party may petition the agency for reconsideration of the Final Order. If no action is taken within twenty (20) days of filing of the petition, it is deemed denied. See T.C.A. §4-5-317 on petitions for reconsideration.

A party may petition the agency for a stay of the Final Order within seven (7) days after the entry date of the order. See T.C.A. §4-5-316.

A person who is aggrieved by a final decision in a contested case may seek judicial review of the Final Order by filing a petition for review in a Chancery Court having jurisdiction (generally, Davidson County Chancery Court) within sixty (60) days after the entry date of a Final Order or, if a petition for reconsideration is granted, within sixty (60) days of the entry date of the Final Order disposing of the petition. (However, the filing of a petition for reconsideration does not itself act to extend the sixty day period, if the petition is not granted.) A reviewing court also may order a stay of the Final Order upon appropriate terms. See T.C.A. §4-5-322 and §4-5-317.